

No. 84-1362

9
Supreme Court, U.S.

FILED

WAN 3 1986

IN THE

JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KIRK J. EMGE,

General Counsel,

Public Service Commission

of Maryland,

231 East Baltimore Street,

Baltimore, Maryland 21202,

(301) 659-6011.

TABLE OF AUTHORITIES

Cases

	PAGE
Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978)	8
Ambassador, Inc. v. United States, 325 U.S. 317 (1945)	9
Columbia Broadcasting System v. United States, 316 U.S. 407 (1942)	2, 10
General Telephone Co. v. FCC, 413 F.2d 390 (1969), cert. denied 396 U.S. 888 (1969)	7
Hallie v. Eau Claire, 105 S. Ct. 1713 (1985)	7
Lechtner v. Brownyard, 679 F.2d 322 (3rd Cir. 1982)	8
Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950)	8
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	4
New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, 742 F.2d 1 (1st Cir. 1984)	2, 3
New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, 579 F. Supp. 1356 (1984)	5
South Central Bell Telephone Co. v. Kentucky Public Service Commission, Civil Action No. 85-02 (E.D. Ky. 1985)	5
South Central Bell Telephone Co. v. Louisiana Public Service Commission, 570 F. Supp. 227 (M.D. La. 1983)	5

Administrative Decisions	
Amendment of Part 31, 89 FCC2d 1094 (1982)	11
Re The Chesapeake and Potomac Telephone Co. of Maryland, Case No. 7661, Order No. 66177 (Md. Pub. Serv. Comm'n, April 15, 1983)	5
Statutes and Regulations	
Communications Act of 1934:	
47 U.S.C.—	
§ 201(b)	9
§ 205	9
§ 220(b)	4
§ 401	4, 8, 10, 11
§ 401(a)	3, 9, 10
§ 401(b)	<i>passim</i>
§ 402(a)	10, 11
Administrative Procedure Act:	
5 U.S.C.—	
§ 551(4)	2
§ 551(6)	2
§ 554(e)	2

No. 84-1362

IN THE

Supreme Court of the United States**OCTOBER TERM, 1984****PUBLIC SERVICE COMMISSION OF MARYLAND,**
Petitioner,

v.

**THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,***Respondent.***ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT****REPLY BRIEF FOR THE PETITIONER**

1. Although the Respondent concedes that the FCC's "Preemption Order" was the product of an agency rulemaking proceeding (Respondent's Brief, p. 23),¹ The

¹ Specifically, C&P states in its Brief that the Preemption Order was *at least in part* the product of an FCC rulemaking proceeding. It would seem that this statement is based upon the fact that the Preemption Order was issued in a consolidated

Chesapeake and Potomac Telephone Company of Maryland ("C&P" or "Company") nevertheless maintains that this action constitutes an "order" which is enforceable under Section 401(b) of the Communications Act. 47 U.S.C. § 401(b). In this regard, C&P argues that for purposes of the Communications Act,² there is no clear distinction between a rule and an order and that the substance of the FCC's action, rather than the nature of the proceedings in which that action was taken, determines whether it can be enforced by a private party under Section 401(b). According to the Respondent, FCC "rule-making orders", such as the Preemption order which are highly specific in their requirements and which are directed to and served upon named entities, are no different from FCC adjudicatory orders and are therefore enforceable in federal court on behalf of a private party.

proceeding which included consideration of a Petition for Declaratory Ruling filed by General Telephone Company of Ohio ("GTE"). However, to the extent that an FCC declaratory ruling is enforceable on behalf of a private party under Section 401(b), it would only be enforceable against a party to that proceeding (e.g., the Public Utilities Commission of Ohio). *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942).

² The Respondent and its supporting Amici Curiae maintain that the definitions of "rule" and "order" which are contained in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551(4) and 551(6), have no applicability in construing the same words in the Communications Act (Respondent's Brief, p. 22; BOCs' Brief, pp. 10-11). However, while these definitions are not dispositive of the construction to be accorded to the same words in previously enacted legislation, the provisions of the APA were largely declarative of pre-existing law and can be used in interpreting the Communications Act. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984). In fact, the FCC uses the provisions of the APA to support its argument that its ruling on GTE's Petition for Declaratory Ruling has "like effect as in the case of other orders". 5 U.S.C. § 554(e) (FCC Brief, pp. 21-22, n. 21).

Initially, it should be noted that the Petitioner agrees that it is the substance of the FCC's action and not the particular label placed upon it by the FCC or the nature of the proceedings³ which determines whether or not that action can be enforced by a private party under Section 401(b). Moreover, it is also apparent, as the Respondent and the Bell Operating Companies ("BOCs") admit, that not all FCC actions are enforceable on behalf of private parties under Section 401(b).⁴ Under the enforcement scheme established by Congress, FCC actions which are self-executing and specific in their requirements (i.e., determine the specific rights and obligations of the parties before the FCC) are deemed to be "orders" and are enforceable under that subsection, while other actions such as the adoption of generalized rules of conduct or statements of policy which are uniformly and prospec-

³ Contrary to the Respondent's argument, the nature of the proceeding does affect the substance of the agency's action. For example, in order for the agency's action to be specific in its requirements and self-executing, it is necessary for the agency to consider specific actions which are taken by specific individuals. In the proceedings which culminated in the Preemption Order, the FCC did not consider whether or not the specific act of a specific state commission (with the possible exception of the Public Utilities Commission of Ohio) constituted a violation of the Communications Act or FCC policies. As the FCC stated "a case or controversy in a judicial sense is not required" in order to permit the issuance of the Preemption Order (Pet. App. 60a).

⁴ The Respondent implies that certain FCC rules which are general in their terms and applicability may not be enforceable by private parties under Section 401(b) (Respondent's Brief, p. 26). The BOCs state that based upon consideration of such factors as finality, clarity and injury, certain agency orders may not be the appropriate subject for immediate court enforcement (BOCs' Brief, p. 16). Clearly, if FCC "rulemaking orders" which are the functional equivalent of provisions of the Act are enforceable under Section 401(b), then the rights and responsibilities which are accorded to the FCC under Section 401(a) are without meaning. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984).

tively applicable to an entire class are not subject to such enforcement proceedings. Consequently, the Respondent, rather than arguing that "rules" are subject to Section 401(b) enforcement proceedings, has attempted to establish that the Preemption Order is, despite its origin, a self-executing FCC "order" and not a "rule" which requires further action by the FCC before it can be enforced by a private party under the enforcement scheme established by Congress in Section 401.⁵ A review of the substance of the Preemption Order and the proceedings which have been instituted to enforce that agency action clearly demonstrate, however, that the Preemption Order is not the kind of self-executing FCC order which Congress intended to be subject to Section 401(b) enforcement proceedings.

In its Memorandum Opinion and Order, the FCC stated that it was necessary to issue a declaratory ruling in order "to clarify for the state commissions and the carriers the effect of our depreciation prescriptions" (Pet. App. 60a). Specifically, the FCC concluded that Section 220(b) of the Communications Act, as well as certain FCC policies, preempted the adoption of inconsistent state depreciation practices (Pet. App. 48a and 56a). As a result, state commissions, in establishing intrastate telephone rates, were precluded from departing from the depreciation methods prescribed by the FCC (Pet. App. 61a). However,

⁵ Respondent attempts to blur the enforcement scheme established by Congress under Section 401 by arguing that the Preemption Order, while concededly a rulemaking order, is nevertheless enforceable under Section 401(b) because it is "regularly made and duly served" and is "self-executing" (Respondent's Brief, p. 26). However, rules, whether they are adopted through adjudicatory or rulemaking procedures, are not binding on parties whose rights and obligations have not been specifically adjudicated by the agency. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). The rights and obligations of the Md. PSC with respect to the Preemption Order have never been adjudicated by the FCC.

the FCC failed to specify what it considered to be an inconsistent depreciation practice or a departure from its prescribed methods. Moreover, as the FCC recognized in its Preemption Order, the setting of depreciation rates only resolves one issue impacting the ratemaking process (Pet. App. 55a). There are numerous other interrelated issues which must also be resolved before specific rates can be established by a state commission. Consequently, in order to determine whether or not an intrastate rate order violates the Preemption Order, a detailed analysis must be made of the state commission's decision-making process. Such an analysis has been made or is in the process of being made by at least three separate District Courts. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 579 F. Supp. 1356 (1984); *South Central Bell Telephone Co. v. Kentucky Public Service Commission*, Civil Action No. 85-02 (E.D. Ky. 1985); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983).⁶ A review of the proceedings in these courts clearly establishes that the Preemption Order is not a highly specific, self-executing order;⁷ further determinations are

⁶ Respondent asserts that while the question of whether a state commission has complied with the FCC's Preemption Order may have arisen in other jurisdictions, this issue did not arise in the proceedings below. However, following the issuance of the Preliminary Injunction by the District Court, similar issues were raised by certain parties and considered by the Md. PSC in implementing the District Court's Order. Although the rates proposed by C&P were ultimately authorized by a majority of the Commissioners, it is apparent from a review of the Commission's Opinion that the Md. PSC did not fully agree with C&P's position that compliance with the FCC's Preemption Order prohibited adjustments to other components of the ratemaking process. *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case No. 7661, Order No. 66177, pp. 5-6 (Md. Pub. Serv. Comm'n, April 15, 1983).

⁷ The role played by these courts in the three enforcement proceedings is also inconsistent with the FCC's assertion that the District Court has a "narrow function" in Section 401(b) proceedings (FCC Brief, p. 25).

required on the part of the FCC before that "order" can properly be enforced against a state commission.

2. The Respondent and its supporting Amici Curiae concede that there will be occasions when the enforcement of the Preemption Order will require the FCC's participation in District Court proceedings (Respondent's Brief, pp. 31-32; BOCs' Brief, pp. 14-15; FCC's Brief, pp. 25-26). Since difficult questions of federal communications law or policy can be referred to the FCC under the doctrine of primary jurisdiction or addressed by the FCC through that agency's intervention in the District Court proceedings, private enforcement of the Preemption Order will not, these parties contend, impinge upon the FCC's role as the party principally responsible for enforcement of the Communications Act nor will it inhibit the development of a uniform, national telecommunications policy.

Although some degree of uniformity could perhaps be achieved through FCC participation in proceedings which are instituted by private parties to enforce the Preemption Order, the use of such a procedure does not assure development of a consistent policy with respect to the implementation of that Order in intrastate telephone ratemaking orders. In this regard, it is apparent that the existence of the procedures suggested by the Respondent did not prevent the District Courts in Louisiana and Maine from enforcing the Preemption Order in an inconsistent manner and thereby precluding the implementation of a uniform depreciation policy. Inconsistent enforcement of the Preemption Order will occur despite the availability of these procedures for a number of reasons. For example, the parties to a particular enforcement proceeding and the District Court may not choose to involve the FCC in those proceedings; the FCC did not participate in the District Court proceedings which were conducted with respect to the Md. PSC's ratemaking

order. Consequently, the decision of the District Court in a private party adjudication may not be consistent with FCC policies. Moreover, in view of the FCC's allegedly limited resources, active participation by that agency in various enforcement proceedings which are instituted by private parties may not be feasible.⁸ Therefore, the mere possibility that the FCC may participate in District Court proceedings is not sufficient to ensure that the Preemption Order will be enforced in a uniform manner. If the goal of promoting the development of a uniform nationwide interstate communications policy permits the FCC to issue its Preemption Order, then that goal also dictates that Section 401(b) not be made available to private parties to enforce that "order". Private party enforcement of the Preemption Order should not be permitted since it would artificially fragment the FCC's enforcement powers and thereby frustrate the development of a comprehensive, consistent and uniform regulatory scheme. *General Telephone Co. v. FCC*, 413 F.2d 390, 402 (1969), cert. denied 396 U.S. 888 (1969).

⁸ In support of its contention that private party enforcement of the Preemption Order should be permitted under Section 401(b), the FCC argues that an agency may not have the resources to police violations of such "orders" (FCC's Brief, p. 25). In view of the FCC's argument that a uniform and consistent communications policy can be achieved through its participation in District Court enforcement proceedings, it is difficult to comprehend how the FCC's resources will be conserved by permitting private parties to enforce the Preemption Order under Section 401(b); conceivably, the FCC could be an unwilling participant in numerous enforcement proceedings which are instituted by parties seeking to promote private interests rather than the public interest which is presumably embodied in the policies adopted by the FCC. *Hallie v. Eau Claire*, 105 S. Ct. 1713, 1720 (1985). It would appear that the FCC's resources can only be conserved by providing it with the sole authority to determine whether the circumstances of a particular case warrant the institution of enforcement proceedings.

To accept the Respondent's broad construction of the word "order" as it is used in Section 401(b) will also have the undesirable effect of increasing the role of District Courts in enforcement proceedings under the Communications Act.⁹ In this regard, it is apparent that by making an FCC adjudication as to whether the specific acts of a specific party are in violation of its Preemption Order a prerequisite to private enforcement under Section 401(b), the number of enforcement cases will in all likelihood be reduced. Moreover, in the cases which do reach the federal courts, the FCC's order will be narrowly focused and applicable to specific parties. As a result, courts will not be required to delve into state ratemaking matters or seek further imput from the FCC. Furthermore, an FCC adjudication will eliminate the need for federal courts to fashion judicial remedies which parallel statutory remedies in order to preserve the due process rights of persons lacking actual notice of an FCC rulemaking order. *See* Justice Powell's concurring opinion in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978).

In sum, a narrow construction of the word "order" will produce an enforcement scheme in Section 401 which will ensure that the FCC, not private litigants, remains the "champion" of the Act¹⁰ and will lessen the amount and extent of litigation in the federal courts.

⁹ It would seem that the FCC has taken the position that in view of its limited resources, it is better to rely on the resources which are available in the federal courts.

¹⁰ *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3d Cir. 1982) and *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950). Contrary to the enforcement scheme suggested by the Respondent and its supporting Amici Curiae, there is nothing in the Act or its legislative history to support the "deputizing" of private parties to enforce quasi-legislative "orders" of the FCC.

3. The Respondent and the BOCs maintain that unless FCC "rulemaking orders" such as the Preemption Order are enforceable under Section 401(b), there may be no statutory provision for the enforcement of this class of agency action (Respondent's Brief, p. 29; BOCs' Brief, p. 12). In this regard, they contend that Section 401(a), 47 U.S.C. § 401(a), only provides for court enforcement of the Communications Act and that not all violations of FCC rules constitute a violation of the Act. As a result, a narrow construction of the word "order" will open a gap in the Congressional enforcement scheme.

With respect to this argument, it should first be noted that the Respondent and its supporting Amici Curiae have failed to provide one example of a violation of an FCC rule which could not be the subject of an FCC enforcement action under Section 401(a).¹¹ Moreover, since the FCC predicated its Preemption Order at least in part on its determination that the Communications Act preempted inconsistent state depreciation practices, it is apparent that that "rulemaking order" could be enforced under Section 401(a). However, even if one assumes that not all FCC rulemaking orders are enforceable under Section 401(a), violations of such orders can easily be enjoined under Section 401(b) following the requisite FCC determination, embodied in an "order", that the specific act of a

¹¹ The Respondent and the FCC assert that a violation of a telephone company tariff regulation is not a violation of any provision of the Act (Respondent's Brief, p. 26, n. 43; FCC's Brief, pp. 19-20, n. 18). However, under Section 201(b) of the Act, 47 U.S.C. § 201(b), it is unlawful to charge a rate which is unjust or unreasonable and under Section 205 of the Act, 47 U.S.C. § 205, the FCC has the authority to prescribe just and reasonable rates. A violation of a just and reasonable tariff provision as established by the FCC in a "rulemaking order" can be considered, therefore, to be a violation of the Act. Consequently, the Respondent's contention that the suit which was the subject of this Court's decision in *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945) could not have been brought under Section 401(a) is without merit.

specific person violated a particular "rulemaking order". Contrary to the assertions of the Respondent and the FCC, such a procedure is neither redundant nor time consuming (when compared to the proceedings which have been conducted in the several District Courts), but is necessary in order to ensure that the FCC discharges the responsibilities which have been conferred upon it by Congress.

4. Relying largely on this Court's decision in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), the Respondent argues that consistency requires that FCC actions which are reviewable "orders" for purposes of Section 402 are also enforceable "orders" for purposes of Section 401 (Respondent's Brief, p. 26). However, since the quasi-legislative rulemaking order at issue here is both reviewable and enforceable (the Preemption Order is reviewable by all parties under Section 402(a) and enforceable by the FCC under Section 401(a)), there is no inconsistency between the enforcement and judicial review provisions of the Communications Act.

In general, the Respondent's reliance on *CBS* to support its argument is misplaced. For reasons which were noted in our opening Brief, the "exceptional" nature of that case required that the term "order" be construed to include quasi-legislative regulations for purposes of allowing judicial review under Section 402(a). Here, no exceptional circumstances exist which require a similar broad construction of that word for purposes of allowing private party enforcement of quasi-legislative "rulemaking orders".

5. C&P implies in its Brief that since the Petitioner participated in certain proceedings which were instituted by the FCC for the purpose of prescribing depreciation rates for the Company, the Md. PSC is bound by the Preemption Order which purportedly requires the Petitioner to use those rates for intrastate ratemaking

(Respondent's Brief, p. 20, n. 31). However, while the Md. PSC submitted comments in certain prescription proceedings, it did not participate or become a party to the proceedings which culminated in the Preemption Order. It should also be noted that at the time the Md. PSC submitted its comments, the FCC was of the opinion that the Communications Act and agency policies did not preempt inconsistent state depreciation practices. *Amendment of Part 31*, 89 FCC2d 1094 (1982). Consequently, although the FCC did not adopt the recommendations of the Md. PSC, there was little reason to appeal the Prescription Orders under Section 402(a). Similarly, since the Md. PSC was not a party to the proceedings which produced the Preemption Order, and since certain state commissions who participated in these proceedings were adequately representing its interests, there was no need for the Md. PSC to join in the appeal of that "rulemaking order".

6. The Petitioner's primary argument is that the term "order" as used in Section 401(b) does not encompass a rulemaking order. The broader issue of whether a state commission is a "person" under Section 401 need not be reached should the Court agree with our primary argument. However, should the Court reach this issue, the Petitioner rests on the arguments contained in its opening brief.

CONCLUSION

For the reasons stated here and in our opening Brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

KIRK J. EMGE,
General Counsel,
Public Service Commission
of Maryland,
231 East Baltimore Street,
Baltimore, Maryland 21202,
(301) 659-6011.